

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

AT&T MOBILITY, LLC
Respondent

and

Case 05-CA-178637

MARCUS DAVIS, an Individual
Charging Party

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ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF FACTS 3

 A. Respondent’s Business..... 3

 B. Respondent’s Business Interests and Respondent’s No-Camera Rule 4

 C. Employer’s Threat of Discipline..... 5

III. ARGUMENT 7

 A. Respondent’s Exceptions Regarding the Rule Allegation Are Unnecessarily Complicated Given the Board’s Straightforward Conclusion in *Boeing* 7

 B. Respondent’s Exceptions Regarding the Threat Allegation Oversimplify the *Boeing* Analysis and Overlook Important Context Demonstrating that Collings’ Statement Violated Section 8(a)(1)..... 10

 1. Respondent Misrepresents *Boeing* to Claim that Section 7 Does Not Protect Employee Recordings, Ignores *Boeing*’s Distinction Between the Maintenance and Application of Lawful Rules, and Distorts *Boeing*’s Holding to Conclude that Respondent May Restrict Employees’ Right to Record Regardless of Circumstance or Business Justification 11

 a. Respondent Misrepresents *Boeing* to Erroneously Argue that Section 7 Does Not Protect Employee Recordings..... 12

 b. Respondent Ignores *Boeing*’s Repeated Distinction Between the Maintenance of Lawful Rules and the Unlawful Application of Otherwise Lawful Rules to Interfere with Section 7 Activity 14

 c. Respondent Distorts *Boeing* to Conclude that Respondent May Prohibit Any and All Employee Recordings Regardless of Circumstance or Respondent Interest 16

 2. Respondent Ignores the Context of this Case Demonstrating that Collings’ Statement Would Reasonably Tend To Interfere With Davis’ Section 7 Activity 20

IV. CONCLUSION..... 23

TABLE OF AUTHORITIES

<i>Adtranz ABB Daimler-Benz Transportation, N.A. v. NLRB</i> , 253 F.3d 19, 28 (D.C. Cir. 2001)...	14
<i>Aroostook County Regional Ophthalmology Center v. NLRB</i> , 81 F.3d 209 (D.C. Cir. 1996)	14
<i>Auburn Foundry</i> , 274 NLRB 1317 (1985), <i>enfd.</i> 791 F.2d 619 (7th Cir. 1986)	3
<i>Flagstaff Medical Center</i> , 357 NLRB 659 (2011), petition for review granted in part and denied in part 715 F.3d 928 (D.C. Cir. 2013).....	passim
<i>Lutheran Heritage Village-Livonia</i> , 343 NLRB 646 (2004)	13, 14
<i>Mediplex of Danbury</i> , 314 NLRB 470 (1994)	20
<i>Price Chopper</i> , 325 NLRB 186 (1997), <i>enfd.</i> 163 F.3d 1177 (10th Cir. 1988)	3
<i>Rio All-Suites Hotel & Casino</i> , 362 NLRB 1690 (2015).....	passim
<i>The Boeing Company</i> , 365 NLRB No. 154 (2017).....	passim
<i>United States v. Blood</i> , 806 F.2d 1218 (4th Cir. 1986).....	3
<i>Whole Foods Market, Inc.</i> , 363 NLRB No. 87 (2015), <i>enfd.</i> mem. 691 Fed. Appx. 49 (2d Cir. 2017)	13, 14, 18, 21
<i>Yale New Haven Hospital</i> , 309 NLRB 363 (1992).....	22

I. INTRODUCTION

As explained below, AT&T Mobility, LLC's (Respondent or Company) Exceptions and Brief in Support are a study in contradiction.¹ On one hand, Respondent overly complicates the analysis of Board's decision in *The Boeing Company*, 365 NLRB No. 154 (2017), in concluding that Respondent may lawfully maintain its no-camera rule. On the other, Respondent oversimplifies and distorts *Boeing's* impact on employees' Section 7 activity to conclude that Respondent did not threaten Communications Workers of America, Local 2336 (Union) steward Marcus Davis (Charging Party or Davis) with discipline after he recorded a grievance and termination meeting.

The Board's decision in *Boeing* was straightforward and explicit: employers may lawfully maintain no-camera rules where a legitimate business interest in maintaining the privacy of confidential information outweighed the rule's impact on Section 7 recording rights. In this regard, several of Respondent's exceptions regarding the lawfulness of its policy appear unnecessary in view of the clarity of the Board's decision in *Boeing*. Nevertheless, the General Counsel agrees with Respondent's ultimate conclusion that the Board should dismiss the rules allegation in the Complaint and Notice of Hearing (the Complaint) in light of *Boeing*.

In contrast, Respondent's exceptions regarding the Complaint's threat allegation distort and oversimplify the *Boeing* analysis to conclude that Respondent did not unlawfully threaten

¹ Respondent's exceptions will be cited as "Exceptions," and its Brief in Support of Exceptions will be cited as "Exceptions Brief." Citations to the ALJ's initial decision appear as "ALJD [page numbers]," and citations to the ALJ's supplemental decision appear as "Suppl. ALJD [page numbers]." Citations to the transcript appear as "Tr. [page numbers]." Citations to the General Counsel's exhibits will appear as "GC Exh.[exhibit number]," and citations to Respondent's exhibits appear as "R Exh. [exhibit number]." Finally, citations to joint exhibits appear as "Jt. Exh. [exhibit number]."

Davis. To hear Respondent tell it, Area Retail Sales Manager Andrew Collings (Collings) simply and innocently restated Respondent's lawful rule. But Respondent's sanitized retelling distorts the law and ignores the facts of this case. Indeed, Respondent somehow miscasts *Boeing*—a case about whether an employer may lawfully *maintain* a no-camera rule and which acknowledged that no-camera rules restrict Section 7 rights—to claim that a union steward does not engage in Section 7 activity when recording a grievance and termination meeting. Further, Respondent's flawed oversimplification ignores the Board's repeated statements in *Boeing* that differentiate the maintenance of a lawful rule from an employer's unlawful application of the rule to restrict Section 7 activity. Respondent also misreads *Boeing* to conclude that employers may apply a lawfully maintained rule to restrict any and all employee recordings in their workplace, regardless of whether the employee is engaged in protected activity and regardless of the employer's legitimate business justifications. In doing so, Respondent's reductive argument overlooks the essential component of *Boeing's* analysis for facially lawful rules: weighing an employer's legitimate business interest against the rule's impact on Section 7 rights.

Further, Respondent failed to present any evidence demonstrating how or why Customer and Proprietary Network information (CPNI) or Sensitive Personal Information (SPI) have ever—or would ever—arise in grievance and termination meeting in a manager's office. Notwithstanding Respondent's effort to strip all context from this case, Davis engaged in Section 7 activity when he recorded the grievance and termination meeting. In this regard, Collings' statement that Davis could be held accountable for future recordings reasonably tended to interfere with, restrain, or coerce employees in the exercise of Section 7 rights.

II. STATEMENT OF FACTS

A. Respondent's Business

Respondent, a limited liability company with an office and place of business in the District of Columbia (Respondent's facility) and has been engaged in the business of providing wireless telecommunication services and devices. (GC Exh. 1-C at ¶2; GC Exh. 1-E at ¶2; Jt. Exh. 2 at ¶5.) Respondent operates at least five retail sales locations in the Washington, D.C.-area, including its store at 1518 Connecticut Avenue in Washington, D.C. (Connecticut Avenue Store) as well as retail stores nationwide (Tr. 31:17–19; *see also* Tr. 13:9–10 (Respondent's counsel admitting that Respondent owns and operates Company-owned retail stores "throughout the United States.")).² The Communications Workers of America (Union) is the collective-bargaining representative of Respondent's employees nationwide. (Jt. Exh. 2 at ¶3.) Davis has worked at the Connecticut Avenue Store since approximately April 2012, and he has been a Union shop steward since October 2012. (*Id.* at ¶1, 4; Tr. 30:24–31:2, 41:10–12.) As a shop steward, Davis processes grievances for employees at five of Respondent's locations in the Washington, D.C.-area. (Tr. 31:12–19, 41:8–9.)

Jason Yu (Yu) is the Retail Sales Manager at the Connecticut Avenue Store. (GC Exh.

² Although statements by a party's counsel may not serve as affirmative evidence favorable to a party, *see Auburn Foundry*, 274 NLRB 1317 fn. 2 (1985), *enfd.* 791 F.2d 619 (7th Cir. 1986), counsel's opening statement may constitute an admission. *See Price Chopper*, 325 NLRB 186, 191–92 (1997), *enfd.* 163 F.3d 1177 (10th Cir. 1988); *see also United States v. Blood*, 806 F.2d 1218, 1221 (4th Cir. 1986) ("[A] clear and unambiguous admission of fact made by a party's attorney in an opening statement in a civil or criminal case is binding on the party.") Thus, the Board should construe Respondent's opening statement as admissions that Respondent owns and operates facilities nationwide. Further, to the extent that the Board declines to rely on Respondent's admission, the General Counsel requests that the Board take administrative notice that Respondent operates facilities nationwide. *See, e.g., AT&T Website, Store Locator* (available at: <https://www.att.com/store-locator/index.html>, last accessed Aug. 7, 2019).

1-C at ¶3; GC Exh. 1-E at ¶3; Tr. 71:22–72:3.) Yu reports to Collings. (Tr. 36:14–25, 58:11–18.) Collings is the Area Retail Sales Manager for the Washington, D.C.-area, which includes five stores. (GC Exh. 1-C at ¶3; GC Exh. 1-E at ¶3; Tr. 36:22–25, 57:13–23.) All five store managers—as well as one to four assistant managers per store—report to Collings. (Tr. 36:22–25; 58:7–18.) One of Collings’ duties is to enforce Respondent’s policies, and he possesses authority to discipline employees. (*Id.* at 37:1–3, 67:19, 69:25–70:3.)

B. Respondent’s Business Interests and Respondent’s No-Camera Rule

As the ALJ found in his Supplemental Decision, Respondent has a “pervasive and compelling interest in the privacy of customer information (Customer and Proprietary Network information (CPNI), the content of customer communications[,]) and Sensitive Personal Information (SPI).” (Suppl. ALJD at 6:13–15 (footnotes omitted).) The ALJ also found that Respondent “has gone to great lengths to protect customer data,” and “[t]he legal and business consequences of a breach of customer data for Respondent are very significant.” (*Id.* at 3:17–20.)

Respondent maintains an internal intranet site called C2IT that includes links to Respondent’s workplace policies and its Code of Business Conduct. (*See* GC Exh. 5 at 5–11; R. Exh. 5; R. Exh. 6; R. Exh. 7; R. Exh. 8.) One of Respondent’s policies accessible through C2IT is its Privacy in the Workplace Policy. (*See* GC Exh. 2; R. Exh. 1; Tr. 41:22–42:3.) The Privacy in the Workplace Policy includes a rule titled Privacy of Communications. (GC Exh. 2; R. Exh. 1.) The Privacy of Communications rule states: “Employees may not record telephone or other conversations they have with their co-workers, managers, or third parties unless such recordings are approved in advance by the Legal Department, required by the needs of the business, and fully comply with the law and with any applicable company policy.” (GC Exh. 2;

R. Exh. 1.) Respondent annually trains employees regarding its Code of Business Conduct. (*See* Tr. 32:15–22, 41:18–42:3, 100:17–19.)

C. Employer’s Threat of Discipline

In about May 2016, Davis attended a grievance and termination meeting for Courtney Throyer (Throyer), a Union member who worked in Respondent’s store in Chevy Chase, Maryland. (*Id.* 33:2–10, 42:14–43:3,44:24–45:2.) Union Vice President Robin Jones (Jones), Store Manager Richard Berlot (Berlot), Assistant Store Manager James O’Neil (O’Neil), and Assistant Manager Ron Aldareina (Aldareina) also attended the meeting. (*Id.* at 33:18–24; 43:4–21, 51:17–52:4.) Davis recorded the meeting on both his personal cell phone and his Company-owned cell phone.³ (*Id.* at 34:10; 43:22–44:10.)

When Davis returned to the Connecticut Avenue store, Yu told Davis that he needed Davis’ Company cell phone. (*Id.* at 34:17–18.) Davis gave Yu his Company cell phone but did not ask why Yu needed it. (*Id.* at 34:22–35:2.) Later that afternoon, Yu again called Davis to the manager’s office. (*Id.* at 35:3–9, 45:6–10, 76:2–17.) Yu asked if Davis knew why Yu had taken Davis’ Company cell phone. (*Id.* at 35:9–10.) Davis indicated that he did know why, and Davis stated that Respondent’s management thought Davis recorded Throyer’s grievance meeting. (*Id.* at 35:10–11.) Yu told Davis that he (Davis) knew that Company rules prohibited Respondent’s employees from recording employees, managers, or their interactions on Company property. (*Id.* at 35:13–15, 76:20–23.) After Yu told Davis that he was going to give Davis a coaching about the rule, Yu instructed Davis not to record meetings again and directed Davis to

³ Respondent provides its employees with cell phones so that employees will be familiar with the devices when making sales with customers. (Tr. 59:7–60:1.)

erase the recording from his Company cell phone.⁴ (Id. at 35:15–17.) Davis explained that Washington, D.C.-law permits recordings when one party gives consent, but Yu simply reiterated Respondent’s recording rule. (Id. at 35:19–24.) The next day, Collings approached Davis while Davis used the computer in the non-public area of the store. (Tr. 36:8–12, 46:5–10.) Collings instructed Davis not to record anymore. (Tr. 37:7–8.) According to Davis, Collings said that Respondent’s rule prohibited recording and that Collings had fired employees for recording.⁵ (Id. at 37:8–9, 47:4–8.) Davis then told Collings that Respondent was violating state law, and Collings promised Davis he would provide him with a copy of the Privacy of Communications rule. (Id. at 37:9–13.) On May 27, 2016, Collings followed through on his promise to provide a copy of the rule when he e-mailed a copy of the rule to Jones and Davis. (Id. at 39:3–5, 47:15–22; GC Exh. 3.)

⁴ Davis and Yu disagreed about who erased the recording from Davis’ Company cell phone. (See Tr. 35:16–17, 77:11–16.) Neither the ALJ’s initial or supplemental decision resolved whether Yu or Davis deleted the recording. Nevertheless, it is irrelevant whether Davis or Yu erased the recording from Davis’ Company-owned cell phone.

⁵ As the ALJ explained in his Supplemental Decision, Collings testified that he told Davis he did not want to see anyone held accountable for not following the policy. (Suppl. ALJD at 2:40–42 & fn. 2.) The ALJ credited Collings’ testimony as to Collings’ exact words. (Id. at 2:40–42 & fn. 2.) Although the ALJ did not explain the reasons for his credibility determination, the ALJ explained that he did not “regard the difference in their versions of the conversation to be significant” and that “[e]ither one communicated to Davis that employees might be disciplined for violation of Respondent’s [Privacy of Communications] rule.” (Id. at fn. 2.) Further, Collings acknowledged at hearing that being held accountable could include discipline. (Tr. 69:17–19.) In this regard, the Board should conclude an employee would construe accountability as indistinguishable from discipline or discharge.

III. ARGUMENT

A. Respondent's Exceptions Regarding the Rule Allegation Are Unnecessarily Complicated Given the Board's Straightforward Conclusion in *Boeing*

As Respondent correctly observes in its Exceptions and Brief in Support, the Board should reverse the ALJ's supplemental decision that Respondent's Privacy of Communications rule is unlawful. (*See* Exceptions Brief at 22–25; *see also* Exception 4.) But the bulk of Respondent's arguments in support of this conclusion are much more complicated—and unnecessary—than required under the Board's straightforward analysis in *Boeing*. (*See* Exceptions Brief at 25–37; Exceptions 1–2, 4–11.) *Boeing* established a framework for determining whether an employer may lawfully maintain a facially neutral rule: weighing the rule's adverse impact, if any, on Section 7 rights against an employer's legitimate business justification for maintaining the rule. *Boeing*, *supra*, slip op. at 3, 14. Further, the Board specifically analyzed no-camera rules like Respondent's Privacy of Communication rule. *Id.* at 17–19. The Board repeatedly concluded that employers may maintain no-camera rules because the employer's interests in confidentiality outweighed the no-camera rule's “comparatively slight” impact on Section 7 rights.

Given the Board's explicit determination in *Boeing*, the Board does not need to resolve the majority of Respondent's exceptions⁶ to properly analyze the question underlying the Complaint's rules allegation: whether Respondent violated Section 8(a)(1) by maintaining an unlawful rule. Thus, the Board need not determine whether Respondent's Privacy of

⁶ Other exceptions are simply incorrect as a matter of law. For reasons that will be explained in greater detail, *infra*, Part III.B, Respondent incorrectly claims that the ALJ erred in concluding that employees, like Davis in this case, exercise Section 7 rights if they record a grievance and termination meeting during worktime in a work area. (Exception 3, 12–15.)

Communications rule constitutes a policy in itself or must be read as a part of the Privacy in the Workplace policy and in the context of Respondent's other policies in order to properly apply *Boeing*. The Board in *Boeing* has already decided that employers may lawfully maintain a no-camera rule where the employer's interest in confidentiality outweighs the impact on Section 7 rights. The Board also need not determine whether Respondent may easily promulgate a rule more narrowly tailored to its interests, whether a more narrowly tailored rule would adequately protect Respondent's interests, or whether an employee will know in advance what others will say when recording a conversation. The Board in *Boeing* has already decided that employers may lawfully maintain a no-camera rule where the employer's interest in confidentiality outweighs the impact on Section 7 rights. Likewise, the Board need not determine whether the ALJ correctly described Respondent's rule of least privilege, whether limitations on access to CPNI and SPI diminish the dangers of employee recordings, or whether Davis could have hypothetically discussed CPNI or SPI with Respondent's supervisors. The Board in *Boeing* has already decided that employers may lawfully maintain a no-camera rule where the employer's interest in confidentiality outweighs the impact on Section 7 rights. Accordingly, there is no need for the Board address the majority of Respondent's exceptions in this case.

Instead, the Board needs only to apply its own straightforward conclusion to the facts of this case. As Respondent repeated in detail in its Exceptions Brief, Respondent's legal and business obligations provide Respondent with strong incentives to secure private customer data. (Exceptions Brief at 5–18). The ALJ found that Respondent has a “pervasive and compelling interest in the privacy of customer information (Customer and Proprietary Network information (CPNI), the content of customer communications[,], and Sensitive Personal Information (SPI).” (Suppl. ALJD at 6:13–15 (footnotes omitted).) The ALJ also found that Respondent “has gone

to great lengths to protect customer data,” and “[t]he legal and business consequences of a breach of customer data for Respondent are very significant.” (*Id.* at 3:17–20.) By contrast, the employer in *Rio All-Suites Hotel & Casino* had not linked its “generalized” interest in “guest privacy” and the “integrity” of gaming operations to its no-camera rule. 362 NLRB 1690, 1693 (2015). Nevertheless, the Board in *Boeing* concluded that the employer’s no-camera rule in *Rio All-Suites Hotel*—which prohibited using *any* type of audio/visual recording device without employer permission—was lawful. *See Boeing*, *supra*, slip op. at fn. 89. In this regard, Respondent’s interests in the privacy of customer information are more compelling than the generalized interests justifying the no-camera rule at issue in *Rio All-Suites Hotel*.

Moreover, the restrictions in Respondent’s Privacy of Communications rule track closely with restrictions included in rules the Board found to be lawful in *Boeing*. Specifically, Respondent’s Privacy of Communication rule prohibits employees from recording “telephone or other conversations with co-workers, managers, or third parties Respondent’s legal department approves the recording in advance, the needs of the business require the recording, and required by the needs of the business, and fully comply with the law and with any applicable company policy.” (GC Exh. 2; R. Exh. 1.) By comparison, the Board concluded in *Boeing* that an employer could lawfully maintain rules prohibiting employees from using camera phones “to take photos on property without permission from a Director or above” and using “cameras,” or “any type of audio visual recording equipment . . . unless specifically authorized for business purposes” *Rio All-Suites Hotel*, *supra*, at 1692; *see also Boeing*, *supra*, slip op. at fn. 89 (citing *Rio All-Suites Hotel*, *supra*, 362 NLRB at fn. 12 (Board Member Johnson’s dissenting position)). Given the similarities between the text and justifications for the employer’s rule in *Rio All-Suites Hotel* and the text and justifications for Respondent’s Privacy of Communications

rule, the Board therefore need not complicate its analysis with the bulk of Respondent's extraneous exceptions. Under *Boeing*, Respondent may lawfully maintain the Privacy of Communications rule as a lawful, Category 1-type rule, and the Board should dismiss the rule allegation.

B. Respondent's Exceptions Regarding the Threat Allegation Oversimplify the *Boeing* Analysis and Overlook Important Context Demonstrating that Collings' Statement Violated Section 8(a)(1)

Whereas Respondent's exceptions regarding the Complaint's rule allegation are mostly unnecessary complications, Respondent's exceptions regarding the Complaint's threat allegation repeatedly—and incorrectly—oversimplify the analysis.⁷ (Exceptions Brief at 37–38; *see also* Exception 3, 12–15.) Respondent's erroneous oversimplification proceeds in two steps. First, Respondent paradoxically claims that Davis either did not engage in Section 7 activity when he recorded Throyer's grievance and termination meeting,⁸ overlooks the Board's explicit

⁷ Indeed, Respondent expends just two conclusionary pages of its Exceptions Brief explaining why Collings' statement to Davis did not violate the Act. (Exceptions Brief at 37–38.) However, Respondent expends considerable effort claiming that ALJD's decision cannot be reconciled with the Board's decision in *Flagstaff Medical Center*, 357 NLRB 659 (2011), petition for review granted in part and denied in part, 715 F.3d 928 (D.C. Cir. 2013), and attempting to explain that a more narrowly tailored rule would not protect Respondent's interests. (Exceptions Brief at 25–35.) Respondent presents these arguments in support of its claim that it may lawfully maintain its no-camera rule. For the reasons set forth above, *see* discussion, *supra*, Part III.A, the Board need not address Respondent's arguments to conclude that Respondent may lawfully maintain its no-camera rule.

But Respondent's arguments also appear to inform its fundamental misunderstanding of *Boeing* and its conclusion that it may prohibit any and all employee recordings in its facility, regardless whether the employee's recording constitutes protected activity or whether Respondent's legitimate interests. Accordingly, this answering brief will address these arguments in its analysis of the threat allegation. *See* discussion, *infra*, Part III.B.

⁸ The ALJ correctly concluded that Davis attended a grievance and termination meeting with a bargaining-unit member Throyer and Union Vice President Jones on about May 16, 2016. (Suppl. ALJD at 2:25–27 & fn 7.) Although Respondent excepts to the ALJ's finding that the meeting Davis attended was not a grievance meeting (*See* Exception 14), Respondent provides

explanation that employers may violate the Act if they apply otherwise lawful rules to Section 7 activity, and erroneously contends that employers may prohibit any and all employee recordings regardless of whether the recording is protected or the employer's legitimate justifications.

Second, Respondent builds on its erroneous analyses to claim that Collings innocently informed Davis about a lawful rule that prohibits any and all recordings. At both steps, Respondent's argument elides Board precedent and the record in this case.

1. Respondent Misrepresents *Boeing* to Claim that Section 7 Does Not Protect Employee Recordings, Ignores *Boeing's* Distinction Between the Maintenance and Application of Lawful Rules, and Distorts *Boeing's* Holding to Conclude that Respondent May Restrict Employees' Right to Record Regardless of Circumstance or Business Justification

Respondent's Exceptions Brief makes three principal errors in concluding that Collings' statement to Davis could not have violated Section 8(a)(1). First, Respondent claims that employees have no Section 7 right to make audio and video recordings because an employer may *generally* maintain a no-camera rule preventing employees from making audio and video

no explanation for why substantial evidence did not support the ALJ's factual findings. Instead, Respondent simply cites contrary, self-serving testimony from Respondent's supervisor claiming that the purpose of the meeting was to announce Throyer's termination. (*See* Exceptions Brief at fn. 9.) But the mere existence of conflicting evidence cannot be the basis for reversing an ALJ's factual finding; otherwise, the Board would essentially review every finding of fact *de novo*. In this regard, Respondent has provided no reason to conclude that the ALJ erred in his finding of fact.

Moreover, Respondent does not explain the relevance of its exception. Even if the Board were to incorrectly reverse the ALJ's factual finding on this point, Respondent has not explained why Davis' Section 7 rights would turn on whether Respondent's supervisors simply stated bases for terminating Throyer, rather than engaging Davis, Jones, and Throyer in a grievance discussion. In either circumstance, Union steward Davis and Vice President Jones attended the meeting in support of a bargaining-unit employee facing discipline. Given the Union's duty of fair representation, Davis and Jones would need to evaluate next steps the Union might take in support of the employee. Accordingly, Respondent's exception on this point appears to be irrelevant.

recordings under *Boeing*. (Exceptions Brief at 38.) Second, Respondent ignores the Board’s repeated observation that employers unlawfully interfere with Section 7 activity where the employer applies an otherwise lawful rule to Section 7 activity. Finally, Respondent claims that it may prohibit any and all recordings in the workplace regardless of whether the employee is engaged in protected activity and whether Respondent has demonstrated a legitimate business interest. (Ibid.) Respondent’s Exceptions Brief never explains why such broad, all-encompassing conclusions would be the necessary result of *Boeing*’s generalized holding. Instead, Respondent simply ignores and distorts specific language in *Boeing* to reach its oversimplified conclusion: Collings could not have violated Section 8(a)(1) because Respondent may lawfully maintain a no-camera rule. (Id. at 38.)

a. Respondent Misrepresents *Boeing* to Erroneously Argue that Section 7 Does Not Protect Employee Recordings

Respondent’s Exceptions Brief first distorts the *Boeing* Board’s decision to reverse its decision in *Rio All-Suites Hotel* to reach an overly broad result. According to Respondent, the Board in *Boeing* “expressly endorsed” Member Johnson’s dissent in *Rio All-Suites Hotel* to conclude that employees have no right to record in the course of Section 7 activity. (Ibid.) But *Boeing* says no such thing. In fact, the Board’s footnote in *Boeing* discussing Member Johnson’s *Rio All-Suites Hotel* dissent noted only that the Board “agreed with Member Johnson that the Board majority in *Rio All-Suites Hotel* improperly limited *Flagstaff* to the facts of that case and failed to give appropriate weight” to the employer’s interests. *See Boeing*, supra, at fn. 89. Rather than conclude that employees have *no* Section 7 right to record, the Board thus applied its new analytical framework for facially neutral rules and weighed the employer’s legitimate business justifications against the rules’ impact on Section 7 rights.

In fact, the Board in *Boeing* explicitly acknowledged employees’ Section 7 right to record otherwise protected concerted activities when it characterized no-camera rules as Category 1-type rules that are lawful to maintain despite their reasonable tendency to interfere with Section 7 rights. *See Boeing*, supra, at 17–19 & fn. 89. Specifically, the Board explained that Category 1 included two subtypes of rules: (a) rules, that when reasonably interpreted, do not prohibit or interfere with the exercise of Section 7 rights; and (b) rules that are generally lawful to maintain because a potential employer’s legitimate justifications outweigh the potential adverse impact on Section 7 rights. *See id.* at 3–4, 15–16 & fns. 17, 77. The Board then characterized the no-camera rules at issue in *Boeing*, *Flagstaff*, and *Rio All-Suites Hotel* as Category 1(b)-subtype rules that potentially interfere with the exercise of Section 7 rights. *Id.* at 19 & fn. 89. In this regard, the Board in *Boeing* explicitly acknowledged that protected conduct includes employee recording.

Similarly, in *Whole Foods Market, Inc.*, the Board observed that protected conduct may include “recording images . . . documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions.” 363 NLRB No. 87, slip op. at 3 (2015) (citing *Rio All-Suites Hotel*, supra, at 1693), enfd. mem. 691 Fed. Appx. 49 (2d Cir. 2017). The Board concluded that Section 7 protects audio or video recording in the workplace “if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present.” *Ibid.* Accordingly, the Board’s rationale in *Whole Foods* tracks with the Board’s rationale in *Boeing*.⁹ In view of the above,

⁹ Respondent’s Exceptions Brief also contends that the Board should “reverse” *Whole Foods* because *Boeing* reversed two cases, *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) and *Rio All-Suites Hotel*, supra, on which *Whole Foods* relied. (Exceptions Brief at fn. 11.) But

Respondent's claim that Davis' recording "has nothing to with protected activity" (Exceptions Brief at 37) is wholly inapposite.

b. **Respondent Ignores *Boeing's* Repeated Distinction Between the Maintenance of Lawful Rules and the Unlawful Application of Otherwise Lawful Rules to Interfere with Section 7 Activity**

Respondent's exceptions attempt to innocently recast Collings' as a simple restatement of Respondent's otherwise lawful no-camera rule. (Exceptions Brief at 37–38). But Respondent's argument simply ignores the Board's repeated distinction of the lawful maintenance of a rule from the application of an otherwise lawful rule to employees engaged in protected conduct. *Boeing*, supra, at fns. 15, 76, 84; see also *id.* at 16 (citing *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209, 213 (D.C. Cir. 1996) and *Adtranz ABB Daimler-Benz Transportation, N.A. v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001)). As an example, the Board stated that an employer's decision to impose discipline, pursuant to an otherwise lawful rule, on employees who engage in protected activity may constitute "unlawful interference with the exercise of protected rights in violation of Section 8(a)(1)." *Id.* at 16. Moreover, the Board observed that the record in *Boeing* contained "no allegation that [the employer's] no-camera rule has actually interfered with any type of Section 7 activity" or "any evidence that the rule prevented employees from engaging in protected activity." *Id.* at 19. Accordingly, the Board

as explained above, *Boeing's* rationale for no-camera rules tracks with the Board's rationale with *Whole Foods*: weighing an employee's Section 7 right to record against an employers' interest in restricting recording. Further, the Board in *Boeing* simply replaced *Lutheran Heritage's* analytical framework for facially neutral rules and concluded that the employers may generally maintain no-camera rules where their legitimate business interests justify the impact on Section 7 rights. But the Board did *not* conclude that employees never have a Section 7 right to record images or video, and it did not overrule *Whole Foods* despite having an opportunity to do so. On the contrary, the Board acknowledged that no-camera rules restrict Section 7 rights. See *Boeing*, supra, at fn. 89. Accordingly, the Board should decline Respondent's invitation to overrule *Whole Foods*.

has specifically concluded that the lawful maintenance of a no-camera does *not* mean that an employer may rely on the rule to restrict any and all Section 7 activity regardless of context. On the contrary, the Board has explained that an employer's application of an otherwise lawful rule to Section 7 activity may itself be an unlawful interference with employee rights.

Respondent's silence on this point therefore makes sense; Respondent may simply hope the Board will decide to ignore its own words in *Boeing* and conclude that a generally lawful no-camera rule permits an employer free rein to interfere with Section 7 activity. But the record in this case precisely demonstrates the Board's repeated distinction between a rule's lawful maintenance and unlawful application of a rule to restrict Section 7 activity.¹⁰ Here, Davis attended and recorded Throyer's grievance and termination meeting as a union steward. Respondent presented no evidence that any sensitive customer data arose during the meeting. Nevertheless, both Yu and Collings instructed Davis that he had violated Respondent's no-camera rule. Collings also told Davis that employees would face discipline for future recordings of grievance and termination meetings. Respondent's statements therefore did not protect any legitimate interest in customer data. Instead, Collings' statement that employees could be held accountable applied an otherwise lawful rule to interfere with Davis' future Section 7 activity. In this regard, Respondent's application of its lawful no-camera rule in response to Davis' recording of a grievance and termination meeting unlawfully interfered with employees' Section 7 activity. *See* discussion, *infra*, Part III.B.2.

¹⁰ To the extent Respondent suggests it did not restrict Davis' Section 7 activity because Respondent's agents did not immediately direct Davis to cease recording during the grievance and termination meeting (Exceptions Brief at 18–19; *see also* Exception 14.), Respondent ignores Yu's demand that Davis turn over Davis' Company-owned cell phone and Yu's instruction to erase the recording. The act of recording a grievance and termination meeting is worthless if employers require employees to delete recordings after the fact.

c. Respondent Distorts *Boeing* to Conclude that Respondent May Prohibit Any and All Employee Recordings Regardless of Circumstance or Respondent Interest

Finally, Respondent erroneously claims that *Boeing* stands for the proposition that an employer may prohibit any and all recordings in the workplace—protected or not—in all cases, regardless of Respondent’s demonstrated business interest. (Exceptions Brief at 38.) But Respondent again ignores and distorts the *Boeing* analysis to reach an overly simplified—overly broad—result. Respondent’s disingenuously suggests that no employee recordings are “central to the Act” because prohibitions on recording “would not prohibit employees” from exercising their Section 7 rights in other ways. (Ibid.) Although Respondent’s brief presents the quoted language as though it appeared as part of a single analytical thought (*see* Exceptions Brief at 38 (citing *Boeing*, *supra*, at 19)), Respondent’s argument actually cobbles its quoted language together from three *different* parts of the Board’s analysis. *See Boeing*, *supra*, at 2, 15, 19. The Board used the phrase “central to the Act” in explaining that the Board should make distinctions between types of protected activity when weighing an employer’s legitimate justifications for a rule against the rule’s impact on Section 7 rights. *Id.* at 2, 15. However, the Board’s observation that prohibitions on recording do not prevent employees from engaging in other forms of Section 7 activity comes from the portion of its decision weighing the actual impact of no-camera rules against the employer’s justification. *Id.* at 17, 19.

But rather than reach the broad conclusion that no employee recording could be central to the Act, the Board’s analysis suggested only that no-camera rules have a “comparatively slight” impact on Section 7 rights when weighed against confidentiality justifications. *Ibid.* Thus, the Board’s weighing of employer justifications in *Boeing*, *Flagstaff*, and *Rio All-Suites Hotel* against Section 7 rights reflects only that an employer may *generally* maintain no-camera rules. But the Board’s weighing of these interests does not mean that an employer’s justifications

override employees' Section 7 rights to record in every circumstance. On the contrary, the Board explained that parties may introduce specific evidence regarding the impact on Section 7 rights or an employer's specific justifications for a rule. *Id.* at 15. The Board further explained that the Board "may draw reasonable distinctions between or among industries and *work settings.*" *Ibid.* (emphasis added). In addition, the Board explained that it may also consider "particular events that may shed light on the purpose or purposes served by a challenged rule or on the impact of its maintenance on protected rights." *Id.* at 15–16. The Board's decision in *Boeing* therefore evaluated only whether the employers in question demonstrated legitimate interests that justified generally maintaining a no-camera rule.

In this regard, Respondent's disingenuous conclusion—that employers may ban all employee recordings, regardless of whether the recording is protected under Section 7 and regardless of the employer's justification—again oversimplifies the Board's analysis. Respondent simply ignores "comparatively" to focus only on "slight." But comparison, the weighing of competing interests, is at the heart of the *Boeing* analysis. In this case, Respondent presented evidence regarding the various legal and business reasons that justify maintaining a general no-camera rule. Yet notwithstanding Respondent's claim that it cannot permit *any* recordings in any context because it is impossible to know in advance whether CPNI or SPI will arise any conversation in Respondent's facility, Respondent has not explained how or why customer information would *ever* arise in a grievance and termination meeting. Respondent presented no evidence that customer information arose in the grievance and termination meeting Davis attended. Respondent presented no evidence that customer information has ever arisen in

a grievance and termination meeting. Instead, Respondent’s evidence focused almost entirely on disclosures that might arise from a recording of an employee’s interactions with customers.¹¹

In contrast, a restriction on a union steward’s ability to record grievance and termination meetings represents a significant restriction on employees’ Section 7 rights. In *Whole Foods*, the Board explained that protected conduct may include “recording images . . . documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions.” 363 NLRB No. 87, slip op. at 3 (2015) (citing *Rio All-Suites Hotel*, supra, at 1693), enf. mem. 691 Fed. Appx. 49 (2d Cir. 2017). A steward’s role in supporting bargaining-unit employees during a disciplinary meeting is among the quintessential—indeed, most critical—rights the Act protects. Moreover, as the ALJ noted, covert recording is often “an essential element in vindicating the underlying Section 7 right.” (Suppl. ALJD at 4:44–45 (citing *Whole Foods*, supra, slip op. at fn. 8).)

Here, it is uncontroverted that Davis recorded Throyer’s grievance and termination meeting while acting in his role as Union steward. The record reveals no evidence that CPNI or

¹¹ To the extent grievance and termination meetings are likely to address an employee’s working conditions or performance that involve customers, Respondent has not demonstrated that such conversations would ever include the types of specific customer data that implicate Respondent’s legal or business interests. Moreover, Respondent acknowledges that Davis took handwritten notes “[t]hroughout the meeting.” (Exceptions Brief. at 19.) But Respondent does not explain how or why a steward’s handwritten notes could not as accurately replicate whatever customer information may be presented in grievance and termination meeting. Yet Respondent does not differentiate Davis’ notes or broadly claim that union stewards may be prohibited from taking notes during a grievance and termination meeting—perhaps because Respondent knows that doing so would strike at the heart of a union steward’s function in a grievance and termination meeting. Nevertheless, Respondent’s decision to permit Davis to engage in a handwritten recording but to prohibit him from engaging in another type of recording in the future demonstrates the incongruity of Respondent’s claim that it cannot permit audio or video recording in a grievance or termination meeting.

SPI arose—or ever could have arisen—during the meeting. In response to Davis’ recording, Yu retrieved Davis’ Company cell phone and erased Davis’ recording. Collings then told Davis that he could be terminated for future recordings. Thus, the weighing of interests in this case—the comparison at the heart of the *Boeing* test for facially lawful rules—demonstrates only that under *Boeing*, Respondent may generally maintain its no-camera rule, not that Respondent’s may prohibit any and all employee recordings regardless of Respondent’s business interests. In this regard, Respondent’s business interests justify generally maintaining Respondent’s no-camera rule. But Respondent’s evidence neither justifies prohibiting employees from recording in grievance and termination meetings, nor instructing employees that they may be disciplined if they record grievance and termination meetings in the future.¹²

¹² Elsewhere its brief, Respondent also relies on *Flagstaff* for the proposition that Respondent cannot limit its Privacy of Communications rule to working time or working areas because employees might discuss sensitive customer information, including during breaks or in non-work area discussions of working conditions. (Exceptions Brief at 32–37.) But in doing so, Respondent misrepresents the Board’s holding in *Flagstaff*. Respondent claims the Board held the hospital was justified in maintaining its policy “as it was ‘designed to assure ‘[the hospital] never had a picture taken that had a patient inadvertently or consciously walking by and included in that picture.’” See Exceptions Brief at 30, 36 (citing 357 NLRB 659, 683 (2011)). Respondent presents the above quotation as though it appeared in the Board’s analysis. It did not. Instead, the quotation is from the administrative law judge’s recitation of testimony from an employer witness. 357 NLRB 659, 683. Although the Board agreed with the judge’s conclusion that the rule was not overly broad, the judge highlighted the above testimony simply to conclude that the employer had not adopted the rule in response to protected union activities. *Id.* at 663, 683. The Board did not rely on the witness’ testimony in its analysis of whether employees would reasonably interpret the rule as a restriction on Section 7 activity; accordingly, Respondent misreads the Board’s holding. See *id.* at 662–63.

Yet even if Respondent contends that the Board implicitly adopted the judge’s decision in its entirety, the judge also concluded:

“[I]t is clear that [the hospital] may not utilize this policy, specifically designed to protect patient privacy, for purposes inimical to the Act. Thus, [the hospital] may not interpret the policy to prohibit employees from engaging in legitimate union-related activities, such as, for example, taking photos of hospital

2. Respondent Ignores the Context of this Case Demonstrating that Collings' Statement Would Reasonably Tend To Interfere With Davis' Section 7 Activity

Having oversimplified and distorted the Board's analysis in *Boeing* to conclude that either employees have no Section 7 right to record or that an employer may always ignore them, Respondent again oversimplifies the facts of this case to claim that Collings merely informed Davis regarding Respondent's rule. (Exceptions Brief at 37–38.) Because Respondent may lawfully maintain its no-camera rule, Respondent concludes that Collings could not have violated Section 8(a)(1) when he threatened Davis with discipline if he recorded grievance and termination meetings in the future. (Ibid.) In this regard, Respondent erroneously oversimplifies this case in the same way ALJ did in his decision: concluding that the Complaint's threat violation turns on whether Respondent may lawfully maintain its Privacy of Communications rule. Nevertheless, the full context of this case and Board precedent demonstrate that Collings unlawfully threatened Davis.

As explained in the General Counsel's Exceptions and Brief in Support, the Board examines the totality of the circumstances to determine whether an employer's statement reasonably tended to interfere with, restrain, or coerce employee's rights guaranteed under the Act. *See, e.g., Mediplex of Danbury*, 314 NLRB 470, 470–72 (1994). Despite Respondent's suggestion that Davis did not engage in protected activity when he recorded bargaining-unit

bulletin boards, or unsafe working conditions, or a gathering of employees at the union table in the cafeteria, unless patient privacy is compromised.”

Id. at 683. Notwithstanding any interest Respondent has in protecting customer information, in this regard *Flagstaff* therefore also prohibits Respondent from interpreting its no-camera policies to prevent employees from engaging in legitimate union-related activities like grievance or termination meetings—precisely the activity Davis engaged in when he recorded the meeting with Throyer.

employee Throyer’s grievance and arbitration meeting (*See* Exceptions Brief at 37–38; Exception 3, 12), the Board has held employees engage in protected activities both when they attend grievance and termination meetings and when they record otherwise protected activity. *See Thor Power Tool Co.*, 148 NLRB 1379, *enfd.* 351 F.2d 584 (7th Cir. 1965)); *Whole Foods*, *supra*, slip op. at 3 (citing *Rio All-Suites Hotel*, *supra*, at 1693), *enfd.* mem. 691 Fed. Appx. 49 (2d Cir. 2017). Thus, the threat allegation in this matter—that Respondent violated Section 8(a)(1) when Collings threatened Davis with termination if he did not adhere to the Privacy of Communications rule in the future—turns on whether Collings’ statement, in the totality of the circumstances, reasonably tended to interfere with employees’ rights under the Act. In view of Davis’ Section 7 activity in recording a bargaining-unit employee’s grievance and termination meeting and Respondent’s repeated instructions not to record, Collings’ statement would reasonably tend to interfere with employees’ rights.

Here, Yu retrieved Davis’ Company cell phone and instructed Davis that his recording violated Respondent’s rule. Just about a day later, Collings, Davis’ next-level supervisor, spoke with Davis about the Privacy of Communications rule and instructed him not to record anymore. Collings told Davis that he (Collings) did not want to see anyone held accountable for not following the policy. During Collings’ conversation with Davis, Collings also told Davis that he would provide a copy of the Privacy of Communications rule. As promised, Collings forwarded a copy of the rule within approximately a week.

Accordingly, Collings’ threat would reasonably tend to chill Davis in the exercise of his Section 7 right to record grievance meetings. As the ALJ correctly concluded, Collings’ statement that he did not want to see employees held accountable for violating the Privacy of Communications rule “obviously implies that future violations of the rule may be grounds for

discipline and maybe even discharge” and was “made in response to Davis’ violation of Respondent’s rule in the course of his protected activities as a union steward.” (Suppl. ALJD at 7:25–29.) In the span of two days, Davis had four separate conversations with Respondent’s management regarding the Privacy of Communications rule—including direct instructions from the Area Retail Sales Manager for the entire Washington D.C.-region. Collings also told Davis that employees would be held accountable for failing to follow Respondent’s Privacy of Communications rule. Moreover, when Collings later forwarded a copy of the rule to Davis, he demonstrated that his instructions were not optional; instead, Davis was to adhere to the rule in the future. *See e.g., Yale New Haven Hospital*, 309 NLRB 363, 363, 368 (1992) (approving administrative law judge conclusion that supervisor unlawfully threatened employee with reprisal by telling an employee that if he did not stop protected activities he would ““talk”” to him again because remark “implies that the talk will not be mere conversation but will concern the employment of the offending employee.”). Given Collings’ instructions and authority to discipline employees, an employee would reasonably conclude that the employee would be fired if the recorded a grievance and termination meeting in the future.

Collings’ unlawful statement to Davis therefore does not depend on whether Respondent may lawfully maintain a no-camera rule. Regardless of the rule, Davis unquestionably engaged in Section 7 activity when he recorded Throyer’s grievance and termination meeting. Regardless of the rule, the sales manager for the entire geographic area told Davis just a day later that he could be discharged for similar Section 7 activity in the future. Accordingly, the Board should reject the Respondent’s overly simplified casting of this case and conclude that Collings’ statement to Davis violated Section 8(a)(1) as an unlawful threat regardless of whether Respondent may generally maintain the Privacy of Communications rule under *Boeing*.

IV. CONCLUSION

For the foregoing reasons, counsel for the General Counsel respectfully requests that the Board overrule Respondent's exceptions.¹³

Dated at Washington, D.C., on August 26, 2019, and respectfully submitted by:

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¹³ Section 102.46(a)(2) requires that any brief in support of exceptions contain “[a] specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.” Respondent’s Brief in Support of Exceptions does not specifically address its exceptions to the ALJ’s conclusions of law, or its exceptions to the ALJ’s failure to find, but the text of these exceptions, standing alone, at least imply the questions involved and factual record relied upon.

Respondent’s Brief in Support of Exceptions likewise omits reference to its exceptions to the Proposed Order. Yet in contrast the exceptions addressed above, Respondent’s exceptions to the proposed order provide no detailed basis for Respondent’s suggestion that relief in this case must be limited to the Charging Party. Given Respondent’s failure to explain the basis and rationale for these exceptions in its brief and absence of support in the exceptions themselves, counsel for the General Counsel contends Respondent’s exceptions as to the ALJ’s Proposed Order should be disregarded in their entirety.

CERTIFICATE OF SERVICE

I hereby certify that Counsel for the General Counsel's Answering Brief to Respondent's Exceptions was filed electronically on August 26, 2019, and, on the same day, copies were electronically served on the following individuals by e-mail:

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